APR 4 1974

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

No. 73-1388
October Term, 1973

MURIEL WATT MEAD, *et al.*,
Petitioners,

vs.

HORVITZ PUBLISHING COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE NINTH APPELLATE
DISTRICT, LORAIN COUNTY, OHIO

BRIEF OF RESPONDENT KATY CAPODICE IN OPPOSITION

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ADDITIONAL STATEMENT OF FACTS

This case was filed on September 18, 1967. Five years later, on September 21, 1972 the matter was dismissed by the Trial Court as to this respondent, and the Notice of Appeal thereto was filed on October 31, 1972. While this respondent does not agree with petitioners' interpretation of the facts, they have had their years in Courts, contrary to pages 17 and 18 of their Brief.

ARGUMENT

I. As to the Respondent Katy Capodice, the Petition for a Writ of Certiorari Fails for Jurisdictional Reasons

There is one legal argument which is applicable solely to the respondent Katy Capodice and that is the jurisdictional thirty day time limit requirement for the filing of a Notice of Appeal in Ohio courts.

> "In a civil case the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days from the date of the entry of judgment or order appealed from." (Ohio Rules of Appellate Procedure, 4 (A)).

The Judgment Entry or final order dismissing this respondent from the case at bar was made and entered on September 21, 1972 in the Common Pleas Court of Lorain County, Ohio, but the Notice of Appeal as to this dismissal was not filed by the Petitioners until October 31, 1972.

Please note the opinion of the Lorain County, Ohio Court of Appeals, as follows:

> "We dismiss the Appeal as to appellee Katy Capodice for the reason that it was not timely filed." (Page 17 of Petitioners' Appendix).

The Judgment Entry of the Lorain County Court of Appeals which reiterates the opinion is attached hereto.

Summarizing, the entry dismissing the respondent Katy Capodice from this case was journalized by the Trial Court on September 21, 1972, and the Notice of Ap-

peal therefrom was filed by the petitioners forty days thereafter, contrary to the only jurisdictional requirement for an appeal in Ohio.

II. The Arguments of Other Respondents Are Adopted by Reference

The primary respondents The Lorain Journal Company, Irving Leibowitz, Jack LaVriha, Jr., and Horvitz Publishing Co. and other respondents will probably provide exhaustive Briefs in response to the alleged three "Reasons for Granting the Writ" set forth in the Petitioners' Brief.

As and for reasons of brevity and termination of the action against this respondent Katy Capodice, all argument contained in the Brief or Briefs of the other respondents are adopted by reference.

CONCLUSION

The Petition for a Writ of Certiorari as to the respondent Katy Capodice should be denied.

Respectfully submitted,

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APPENDIX

Judgment Entry of the Court of Appeals

(Entered June 27, 1973)

Case No. 2083

IN THE COURT OF APPEALS OF OHIO
NINTH JUDICIAL DISTRICT

MURIEL WATT MEAD, *et al.*,
Plaintiffs-Appellants,

v.

HORVITZ PUBLISHING CO., *et al.*,
Defendants-Appellees.

JOURNAL ENTRY

On consideration of the record, briefs, arguments of counsel, and assignments of error on this appeal, the appeal as to the Appellee Katy Capodice shall be and it is hereby dismissed for the reason that it was not timely filed.

On further consideration of the record, briefs, arguments of counsel, and assignments of error on this appeal, the court fails to find any error on the record or in the judgment and proceedings of the court below prejudicial to the rights of the Appellants, or any of them, and the judgment is therefore otherwise affirmed at Appellants' costs, the court also finding that the appeal was not frivolous, and the cause is hereby remanded to the Court of Common Pleas of Lorain County with directions to carry this judgment into execution.

/s/ MYRON T. BRENNEMAN
Presiding Judge—for the Court

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Supreme Court of the United States

No. 73-1388
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MURIEL WATT MEAD, *et al.*,
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vs.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE DISTRICT, LORAIN COUNTY, OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH APPELLATE DISTRICT, LORAIN COUNTY, OHIO

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This action was commenced September 19, 1967, in the Lorain County Court of Common Pleas as Case No. 71855.

It was an action seeking a money judgment of $1,344,000.00. The Complaint alleged a conspiracy to libel. After various proceedings a Second Amended Complaint was filed October 29, 1970, from which many allegations were stricken and to which responsive Answers were then filed.

On July 8, 1971, The Lorain Journal Company, Jack LaVriha, Jr., Irving Leibowitz and Horvitz Newspapers,

Inc., defendants (who were among the twenty defendants), filed a Motion for Summary Judgment in their favor. Said motion was overruled.

On June 9, 1972, the case not then being appointed for trial, The Lorain Journal Company, Jack LaVriha, Jr., Irving Leibowitz Horvitz Publishing Co., and Horvitz Newspapers Inc., these answering defendants, filed a motion for the reconsideration by the trial court of said prior Motion for Summary Judgment, on the basis of the opinion rendered by the Court of Appeals of the Fifth District on March 29, 1972, in the case of *Campbell v. Mansfield Journal Co., Inc.*, being Case No. 1063 in the Court of Appeals of Tuscarawas County, Ohio, and by virtue of the decision of the Court of Common Pleas of Richland County, Ohio, in the case of *Drye v. Mansfield Journal Corporation*, 32 Ohio Misc. 70, both cases being decided after the trial court's prior order.

The trial court, upon reconsideration, and after notice, hearing and arguments of counsel, granted Summary Judgment in favor of said defendants, finding that there was no issue of any material facts and that the moving parties were entitled to judgment as a matter of law.

Subsequently summary judgments were rendered in favor of the other defendants, but the within Brief concerns only the position of these answering respondents.

It is to be pointed out that on page 8 of Petitioners' Brief the statement is made: "Approximately six months later, once trial had been set, the same defendants filed a Motion to Reconsider Summary Judgment." This implies that the action was set for trial when the Motion was filed, which would have been contrary to Ohio Civil Rule 56(B). This however is not true. When the Motion was filed, no trial date was then set. A date previously set had been previously rescinded by the court.

The Court of Appeals of the Ninth District affirmed the judgment of the trial court on June 27, 1973. We attach hereto a copy of the Journal Entry which was not submitted by the Petitioner. The entry set forth on page 21 of Petitioners' Appendix is an interim order made June 8, 1973, and is not the order being appealed from, entered June 27, 1973.

The Ohio Supreme Court overruled Petitioner's motion to certify, and dismissed for lack of constitutional question.

STATEMENT OF FACTS

I

We seriously and emphatically deny that the record in this case evidences the Facts as set forth in the Petitioners' Brief.

The Petitioners' Statement of the Case contains some of the allegations which were made in the Second Amended Complaint as filed in the trial court, but these purported facts are merely hoped-for evidence and are not supported by the record upon which this appeal is to be decided. Much of the so-called Statement of Facts is entirely without substance, has no relation to the record, and is no more than a claim which the Petitioners failed to substantiate.

For example: There is nothing whatever in this record to substantiate the following statements which the Petitioners set forth to this Court in the Statement of the Case which accompanied their Petition for Writ of Certiorari:

(a) "Unknown to her (Mrs. Mead) this firm (Frank Seringer & Chaney) also represented many

subcontractors to whom Washington Square owed money." (Page 5 of Brief.)

(b) "At that meeting, respondent accountant Frank, convinced Mrs. Mead to personally contribute Ninety-Six Thousand Dollars of her own money as well as assign creditors' claims over to himself and co-conspirator respondent Warhola." (Page 5-6 of Brief.)

(c) "Unknown to petitioner, both Frank and Warhola were associated with certain other entities which were to later acquire the apartment project at a bargain price in foreclosure." (Page 6 of Brief.)

(d) "Respondents met and devised a scheme to publish a phony listing of creditors' claims in the Lorain County Journal, a newspaper of general circulation owned and operated by respondent, Horvitz Publishing Company." (Page 6 of Brief.)

(e) "In truth it contained a grossly inaccurate and exaggerated picture of insolvency wherein 18 of the creditors' claims were false, creating a total overstatement of $178,263.18." (Page 6 of Brief.)

(f) "As a result, company creditors made a premature run on the company for payments forcing it into total ruin." (Page 6 of Brief.)

(g) "Respondents were able to get other lending institutions to withdraw and cancel various financial arrangements." (Page 6 of Brief.)

(h) "Washington Square was forced to sell out to the conspirators." (Page 6 of Brief.)

(i) "She (Mrs. Mead) completely lost her other business operations unassociated with Washington

Square, as well as suffered total loss of her personal reputation." (Pages 6-7 of Brief.)

(j) "Mrs. Mead, an already aging woman, faced threats, intimidating remarks, anonymous phone calls and constant harassment from respondents, which eventually caused her to suffer nervous breakdown and necessitated permanent relocation in California." (Brief page 7.)

(k) "Depositions and motion to compel the revealing of the identity of the person who supplied the creditors' list have been denied by the court." (Brief page 10.)

(l) "Throughout the course of this litigation, the five Appellees associated with the Lorain Journal have done everything in their power to impede discovery." (Brief page 10.)

(m) "The petitioners evidence conclusively proves 18 of the so-called creditors' claims totalling in excess of $175,000.00 were false." (Brief page 17.)

(n) "Other leading areas of dispute concern a promise by the paper to print a retraction, the dual representation of respondent attorney and accountants, the motive and real purpose of the financial meeting held shortly before the libelous article appeared in the paper, and finally the slanderous remarks made personally to Mrs. Mead by various of the respondents." (Brief page 17.)

II

The judgment here before the Court was rendered in a summary judgment proceedings. While the issues were framed by the pleadings, under Ohio law the Ohio

Civil Rules require that in a summary judgment proceeding one must look to the Affidavits, Interrogatories and Depositions for the determination of whether there is a judicable issue. In this case no Depositions were filed and the matter came before the court upon Affidavits and Interrogatories.

Ohio Civil Rule 56(E) provides in part that:

> "When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

There is not a word of reference to any of the foregoing "facts" (as alleged by the Petitioners) in the Affidavits or Interrogatories upon which this case was submitted to the trial court. The said foregoing averments of the Petitioners are not statements of fact at all but are sheer fictions and misleading to this Court. We suggest that the inclusion of these statements in the Brief, when in fact they are false and not a part of the record, is an affront to this Court.

There is no evidence whatever that any Respondents ever discussed with other Respondents the article published in the Journal prior to publication. There is no evidence of a conspiracy. There is no evidence that any Defendant got lending institutions to shut off credit. Washington Square was at no time "forced to sell out". The Lorain National Bank (not a party) foreclosed its mortgage and the real estate of Washington Square was sold by the court in an action wherein these Petitioners were parties and no appeal was taken.

III

Because of the misleading Statement of Facts herein alluded to we will set forth the facts as we find them in the record.

The Second Amended Complaint alleges a conspiracy to destroy the plaintiffs and acquire plaintiffs' property for themselves. (See Section VII of plaintiffs' Second Amended Complaint.) It alleges that said conspiracy was proposed and put into effect by Andrew J. Warhola and M. Norman Frank, defendants; that Warhola, Frank, the Central Security National Bank and Katy Capodice, defendants, during early 1966 contacted lending agencies and made slanderous remarks about Muriel Watt Mead and caused credit to be withdrawn; that then ten contractors and materialmen who are termed "creditor defendants" submitted inflated bills by means of which Warhola and Frank prepared an outdated, overstated and exaggerated list of creditors and distributed the same in order to promote their conspiracy—all of which precedes any reference to The Lorain Journal Co., Irving Leibowitz or Jack LaVriha, Jr.

Then, with the alleged conspiracy in full bloom, Item XI of the Second Amended Complaint alleges that the conspirators then conspired with The Lorain Journal Co., its editor, and its reporter, who altered the list further and published a grossly overstated list in The Journal on September 19, 1966. Damages of $1,334,000.00 were sought.

These were the claims of petitioners' pleadings.

We now turn to see what evidence was offered upon hearing of the Motion for Summary Judgment to substantiate this Complaint.

IV

Turning now to the evidence given by affidavit to ascertain the existence of a justiciable issue as to The Lorain Journal Co., Irving Leibowitz, Horvitz Newspapers Inc. and Jack LaVriha, Jr., we find the following:

A. LaVriha's Affidavit:

1. He is and was a reporter for The Lorain Journal Co.
2. On September 18, 1966, he came into possession of a list of creditors of Washington Square Inc., as prepared by M. Norman Frank, CPA, whom LaVriha understood to be a trustee for the benefit of that corporation's creditors.
3. He believed publication to be in the public interest, many local businessmen being affected.
4. He believed the prior officers had declared the corporation insolvent and had conveyed its property to Frank as trustee for creditors.
5. He believed the list to be true.
6. His editor, Irving Leibowitz, was consulted prior to publication.
7. The list was published without alteration on September 19, 1966.
8. He never discussed Washington Square Inc. or any other plaintiff, or any of their affairs with any defendant, either by telephone, personal communication, or by correspondence prior to publication.
9. Muriel Watt Mead was then a person unknown to him.
10. On September 19, 1966, he believed Frank as Trustee had authortiy to prepare and circulate the list.

B. Leibowitz's Affidavit:

1. He is and was editor of The Journal.
2. He believed the publication to be true and approved its publication, considering it a matter of newsworthy public interest.
3. He never discussed the plaintiffs or their affairs with Frank or any other defendants herein either by telephone, personal communication, or correspondence prior to publication.
4. He had and has no knowledge of any conspiracy.
5. The subject of destroying the business or reputation of the plaintiffs or acquiring their property was never discussed by him with any party or with any person, firm or corporation.
6. The article was published in exactly the same form as received, without alteration.
7. Prior to publication Muriel Watt Mead was unknown to him and he had made no inquiry and had no interest in her or in Washington Square Inc. or in their property.

C. Horvitz's Affidavit:

1. He is publisher of The Journal and president of The Lorain Journal Co. and Horvitz Newspapers Inc.
2. Horvitz Newspapers Inc. has had no connection whatever with the publication or circulation of the article.
3. He had charged the Journal's employees prior to September 19, 1966, to publish only articles they believed to be true.

4. He has no knowledge of Muriel Watt Mead or Washington Square Inc.
5. He knows of no conspiracy and never discussed the business, reputation or property of any plaintiff with any person whomsoever before said publication.
6. He finds that the publication was made in the same form as received.

D. Wickens' Affidavit:

1. He is attorney for The Lorain Journal Co.
2. He took the deposition of Muriel Watt Mead in this case on January 13, 1968, wherein Muriel Watt Mead, plaintiff, testified that:
   a. She had signed, with other shareholders of Washington Square Inc. on August 31, 1966, a declaration that said corporation was insolvent, unable to pay its debts, and had resolved to make an assignment for the benefit of creditors.
   b. She had resigned on August 31, 1966, as director and officer of Washington Square Inc. as had Gladys Kastler, Leonard Kastler, Frank Janik and Milton Friedman.
   c. Oliver Thompson's firm had been acting as her attorney.
   d. On August 26, 1966, in behalf of Washington Square Inc. she had conveyed by deed and assignment all the real and personal property of Washington Square Inc. to Mr. Frank as trustee.
   e. On September 23, 1966, she and Gladys Kastler had purported to cancel their resignations and that on said date they had "picked up where they had left off."

E. Warhola's Affidavit:

1. On September 26, 1966, he was attorney for M. Norman Frank, as trustee.
2. On September 27, 1966, he received a letter dated September 27, 1966, from Attorney Oliver Thompson stating "As of this date, the agreement existing between Mr. Michael N. Frank and any of the herein named clients (Washington Square Inc., Muriel Watt Mead, Gladys Kastler) has been declared null, void and of no effect."

F. Gladys Kastler's Affidavit:

1. The Journal's publication of September 19, 1966, listed construction accounts of $397,746.35 owed by Washington Square Inc.
2. The published article "implied" that The Journal had "talked to M. Norman Frank that day."
3. The affiant "believed" the list had been obtained from Rosemary Kuhn or Louis Kuhn.
4. The published article did not state that in reference to three accounts totalling $80,000 the listed figures represented the full amount of the creditors' contracts, or that $90,000 represented a second mortgage to Columbia Gas.
5. The published article overstated the net indebtedness of the corporation by "approximately" 200,000.
6. The Journal made no effort to verify the amounts owed.
7. Mr. Frank has denied giving the list to The Journal.
8. On September 19, 1966, Mr. Leibowitz said the article had not been cleared with him before publication.

9. Mr. Leibowitz has said that the painter, Jack Krupp, and other subcontractors had been to see him prior to publication to confirm that the list would be published. (This is denied in the Leibowitz affidavit).

10. Mr. Leibowitz has refused to print a list of creditors as prepared by the affiant.

11. "On information and belief," affiant says that, before and after publication, Jack LaVriha "contacted" certain subcontractors regarding the financial affairs of Washington Square Inc.

G. Attorney Mahle's Affidavit:

1. He is attorney for the plaintiffs.

2. After he had requested on July 1, 1971, the taking of depositions of certain defendants, the instant Motion for Summary Judgment was filed.

3. His fees for opposing said motion to date are $280.00.

The foregoing comprise the evidence upon which the trial court decided the Motion.

V

The following observations about the facts controlled the disposition of this Motion:

1. There is not a scintilla of proof that the Lorain Journal Company, its editor or reporter, conspired with anyone. The Petitioners charge in their Complaint that other defendants were in conspiracy prior to the publication of September 19, 1966; that Frank and Warhola were the ones by whom it was "proposed, and put into effect;" that "early in 1966" the Central Security National Bank,

the creditor defendants and Katy Capodice somehow joined the conspiracy by making slanderous remarks and contacting financial institutions. But there is no evidence of any of that offered by plaintiffs in the consideration of this Motion. Then the Complaint alleges that the creditor defendants (ten of them) together with Frank Seringer & Chaney, Mr. Frank, and Mr. Warhola conspired with The Journal, its editor and reporter (of which there is not a scintilla of evidence) and that these answering defendants then further altered the list of creditors and published a list which they "knew or should have known to be false," which publication implied insolvency.

The affidavits on file establish that the list of creditors as prepared by Mr. Frank was not altered by The Journal; that Muriel Watt Mead was then unknown to the publisher, editor or reporter of The Journal; that the said list was considered to be true by The Journal and its employees; and that its publication was deemed newsworthy as a matter of public interest.

There is no evidence of any kind that The Journal and its employees did not believe the reported list to be true.

2. The affidavits on file disclose that the publication of the creditors list as prepared by Mr. Frank was published at a time when he was in charge of Washington Square Inc. as trustee and had authority to act for said corporation. It is here shown that Muriel Mead, Gladys Kastler and the other shareholders had, by corporate resolution on August 31, 1966, declared the corporation insolvent, unable to pay its debts and had ordered an assignment for benefit of creditors; that on the same day the directors and officers had resigned; that Muriel Watt Mead as president also had assigned all the property of

the corporation, real and personal, to Michael N. Frank as trustee for creditors, and made no attempt to rescind this action until September 23, 1966, which was four days after the newspaper publication. Therefore, the corporation was in the hands of a trustee for creditors when the publication was made and prior thereto Mrs. Mead and the shareholders themselves had declared the corporation to be insolvent, unable to pay its debts, and in need of a trustee for its creditors.

No claim is made or proof offered of any improper action by The Journal prior to August 31, 1966, when the company was already insolvent by the statement of its officers and shareholders.

3. Nothing in the affidavits is offered as proof that the publication was published by The Lorain Journal Company, its editor, reporter or publisher, with knowledge of its falsity or in reckless disregard of the truth. It will be observed that the Complaint does not allege the publication to have been made with knowledge of its falsity but is couched with the words that when the publication was made these defendants "knew or should have known it to be false," and nothing is offered by way of affidavit in any support thereof.

4. There is absolutely no evidence before the court of any conspiracy which would connect The Lorain Journal Company, Horvitz Newspapers Inc., Irving Leibowitz or Jack LaVriha, Jr. with any alleged unlawful acts that may have been committed by any other defendants. Neither is there any evidence of actionable libel on the part of The Lorain Journal Company, Horvitz Publishing Co., Horvitz Newspapers Inc., Irving Leibowitz or Jack LaVriha, Jr.

In summation of the facts, the trial court said in its opinion:

> "1. There is no evidence that the Lorain Journal Company, its editor or reporter have conspired with any other defendant or defendants in this cause for the purpose of destroying the business and the reputation of the plaintiffs. The affidavits on file establish that the list of creditors as prepared by Mr. M. Norman Frank, accountant for the plaintiffs, was not altered by the Lorain Journal Company. Said affidavits further establish that the plaintiff, Muriel Watt Mead, was not known to the publisher, editor or reporter of the Lorain Journal. Said affidavits further establish that the list of creditors was considered to be true by the Journal and that its publication was deemed newsworthy as a matter of public interest. The affidavits further disclose that the publication of the creditors list as prepared by plaintiffs actually was published at a time when said accountant was in charge of Washington Square, Inc., as trustee, and had authority to act for said corporation. Said affidavit further establishes that Muriel Watt Mead and Gladys Kastler and other shareholders had by corporate resolution on August 31, 1966, declared that the corporation was insolvent, unable to pay its debts, and had ordered as assignment for the benefit of creditors. No claim is made or proof offered of any improper action by the Lorain Journal Company prior to August 31, 1966 when Washington Square, Inc. was already insolvent by statement of its officers and shareholders. There is absolutely no evidence before the Court of any conspiracy connecting the Lorain Journal Company, Horvitz Newspapers, Inc., Irving Leibowitz or Jack LaVriha, Jr. with any unlawful acts committed by any other defendants. . . ."

The Court holds in this case that there is no proof of any conspiracy and that there is no evidence of any damage caused by acts committed pursuant to the non-existent conspiracy. (Pages 7-8 of Petitioners' Appendix.)

REASONS FOR DENYING THE WRIT

Response to Argument No. 1—The Alleged Unconstitutional Statute.

The Petitioners argue that Ohio Revised Code Section 2739.12, which they do not quote, is unconstitutional.

That statute provides:

> "No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof."

Petitioners cite no authority to uphold such contention of unconstitutionality except to cite *Branzberg v. Hayes*, 408 U.S. 665, which clearly made no such determination.

While this Court has held that the First Amendment does not grant newsmen a constitutional privilege that other citizens do not enjoy (*Branzberg v. Hayes*, at 690),

seventeen states, including Ohio, have provided statutory protection to a newsman's confidential sources (*Branzberg v. Hayes,* at 689), which protection this Court has never condemned.

The case of *Branzberg v. Hayes, supra,* only held that the First Amendment in and of itself, does not relieve a newspaper reporter of the obligation to respond to a *grand jury subpoena* and affords him no right to conceal the facts about a *crime* or to conceal the criminal conduct of his sources.

However, the court said:

> "At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience may from time to time dictate.
>
> "There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the condition and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying of course that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." (408 U.S. 665 at 706.)

In the instant case, the Ohio Supreme Court has held that no constitutional question is presented by the Petitioners. Moreover, no criminal proceedings are involved here.

We have herein responded as though the Petitioners' contention as to the constitutionality of Ohio Revised Code Section 2739.12 were relevant.

We assert the constitutionality of the statute is not necessary for decision here.

The Petitioners never sought to depose the newsmen, but in an interrogatory sought of them the source of the article in question. The court sustained objection to the interrogatory.

The source is immaterial if the publication is not actionable, as all courts below have held to date. We do not believe this Court will pass upon the constitutionality of a state statute unless required for decision.

Response to Argument No. 2—Qualified Privilege

The Petitioners in their Brief (pages 12-13) are correct in the following summation of the law of libel in the light of the First Amendment:

(a) No longer is it enough to show that the libelous article was untrue.

(b) No longer is it enough to show that the publishers made inadequate investigation.

(c) No longer is a preponderance of the evidence enough to establish a defamation case.

(d) The plaintiff must prove his case by clear and convincing evidence.

(e) The case of *New York Times v. Sullivan*, 376 U.S. 254, concerning "public officials", was gradually broadened to encompass "public employees". *Rosenblatt v. Baer*, 303 U.S. 75. Then, "public servants". *Garrison v. Louisiana*, 379 U.S. 77. Now the

paramount consideration is to protect areas of "public interest." *Time v. Hill*, 385 U.S. 374, *Rosenbloom v. Metromedia*, 403 U.S. 29.

The limitation is that in areas of general public interest the publication may not circulate knowing or reckless falsehoods.

The Court of Appeals in this case has said:

"The financial condition of companies and individuals engaged in the development of an apartment complex, costing several hundred thousand dollars, and which involves almost a score of local contractors, and their workmen, together with a local financial institution, and others is certainly a matter of 'public or general concern' in the area in which the complex is being erected." (Petitioners' Appendix, page 19.)

The record clearly shows and the trial court and Appellate Courts have held that the publication was of public and general interest and that there is no evidence of a conspiracy to libel, no evidence of an actionable libel, and hence no justiciable issue.

Response to Argument No. 3—Due Process

The Petitioners complain that after the court granted summary judgment to The Lorain Journal Co., Irving Leibowitz, Jack LaVriha, Horvitz Newspapers, Inc., and Horvitz Publishing Co. (after motion, notice, and full hearing), it granted similar judgments in favor of the other joined Defendants.

Obviously, The Lorain Journal Co. and its associated Defendants who hereby file this Brief have no interest in this phase of the Petitioners' complaint.

Suffice to say the Petitioners had full notice, hearing and due process as to the determination of The Lorain Journal Co. motion.

However, once the court determined that there was no actionable libel, the case against the co-defendants for conspiracy to libel collapsed and Petitioners received no prejudice from the court's summary dismissal of the action as to them.

CONCLUSION

The Court of Appeals in its opinion (Petitioners' Appendix, page 17) said:

> "We have examined the pleadings, interrogatories and affidavits submitted, and we conclude that there is no evidence of any conspiracy among the defendants to libel the plaintiffs and no evidence of any actionable libel."

We submit that this is the conclusion to be drawn from the record. The Petitioners have demonstrated no ground for the granting of a Writ of Certiorari.

We submit that the Writ should be denied.

Respectfully submitted,

WILLIAM G. WICKENS
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APPENDIX

JOURNAL ENTRY OF THE COURT OF APPEALS

(Entered June 27, 1973)

No. 2083

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

State of Ohio
ss:
Lorain County

Muriel Watt Mead, *et al*,
Plaintiffs-Appellants,
v.
Horvitz Publishing Co., *et al*,
Defendants-Appellees.

On consideration of the record, briefs, arguments of counsel, and assignments of error on this appeal, the appeal as to the Appellee Katy Capodice shall be and it is hereby dismissed for the reason that it was not timely filed.

On further consideration of the record, briefs, arguments of counsel, and assignments of error on this appeal, the court fails to find any error on the record or in the judgments and proceedings of the court below prejudicial to the rights of the Appellants, or any of them, and said judgments are therefore otherwise affirmed at Appellants' costs, the court also finding that the appeal was not friv-

olous, and the cause is hereby remanded to the Court of Common Pleas of Lorain County with directions to carry said judgments into execution.

WILLIAM H. VICTOR
Judge